UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
(TRENTON)

JEFFREY A. WINTERS and COLLECTION SOLUTIONS, INC., a New Jersey Corporation; on their own behalf and on behalf of all others similarly situated, Plaintiff, -vs- JOSEPH K. JONES, ESQ., BENJAMIN J. WOLF, ESQ., JONES, WOLF & KAPASI, LLC, LAURA S. MANN, ESQ., LAW OFFICES OF LAURA S. MANN, LLC; ARI H. MARCUS, ESQ., YITZCHAK ZELMAN, ESQ., and MARCUS & ZELMAN, LLC Defendants.	Civil Action No. 16-09020

BRIEF IN SUPPORT OF DEFENDANTS ARI H. MARCUS, ESQ., YITZCHAK ZELMAN, ESQ. AND MARCUS & ZELMAN, LLC'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

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I. PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Ari H. Marcus, Esq., Yitzchak Zelman, Esq. and Marcus & Zelman, LLC (collectively "Marcus & Zelman") file this Memorandum of Law in support of their Motion to Dismiss Plaintiffs' First Amended Class Action Complaint ("Complaint"). This Court should dismiss with prejudice Plaintiffs' Complaint alleging state and federal RICO violations, conspiracy to violate New Jersey's RICO statute, fraud, negligence, and legal malpractice filed by Jeffrey A. Winters and Collection Solutions, Inc. ("CSI") because they have failed to state a claim upon which relief may be granted and lack standing.

Plaintiffs are debt collectors who have been sued for repeated and habitual Fair Debt Collection Practices Act ("FDCPA") violations. Congress enacted the FDCPA to end the "abusive, deceptive, and unfair debt collection practices" by debt collectors which "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. §1692(a). The FDCPA was designed to protect consumers who have been harassed by unscrupulous debt collectors, regardless of whether a valid debt actually exists.

It is readily apparent Plaintiffs bring this spurious Complaint against the Defendant attorneys with the dual purpose of having a chilling effect on debtors (and their attorneys) who have been preyed upon by Plaintiffs' continual and predatory FDCPA violations and damaging Defendants' reputations in the legal community based upon the paucity of facts and information contained therein. The Defendant attorneys' sterling reputations have already been tarnished as the filing of the initial Complaint already generated several news stories made available to the general public, the New Jersey legal community, and the greater national legal community. This was clearly illustrated by the Plaintiffs' insinuation of criminal conduct in the original Complaint by virtue of the assertion that Marcus & Zelman operated "a classic, 'Mafia style', racketeering Enterprise", a term immediately pounced upon by news outlets hungry for the latest legal scandal.[1] The criminal

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[1]See the articles below attached to the Certification of Joshua Heines, Esq. ("Heines Cert.") as Exhibit A.

Debt collectors take on lawyers in what may be N.J.'s least empathetic lawsuit, http://www.nj.com/mercer/index.ssf/2017/01/debt_collectors_take_on_lawyers_in_what_may_be_njs.html (site last visited January 18, 2017);

RICO Suit Aimed at Lawyers Who Sue Bill Collectors, http://www.njlawjournal.com/id=1202775979174/RICO-Suit-Aimed-at-Lawyers-Who-Sue-Bill-Collectors?slreturn=20170006161352 (site last visited on January 18, 2017);

5 NJ Attys Hit By Class Action for 'Mafia-Style" FDCPA Suits,

https://www.law360.com/articles/869764/5-nj-attys-hit-by-class-action-for-mafia-style-fdcpa-suits (site last visited January 18, 2017);

Fasten Your Seatbelts For The Case Of This Mafia-Style Consumer Litigation Operation, https://www.insidearm.com/news/00042423-fasten-your-seatbelts-case-mafia-style-co/ (site last visited on January 18, 2017); and, allegations have continued in the Complaint. The damage is done, but should not be allowed to continue.

Marcus & Zelman have brought valid FDCPA claims on behalf of victimized debtors which they have resolved to their clients' satisfaction as has been evidenced by not only the myriad of Motions to Dismiss for Failure to State a Claim in the FDCPA cases which they have survived, but also from the Motions to Certify Class which have been granted. For their exemplary work on behalf their clients, they have been improperly targeted by Plaintiffs. The Complaint, which is frivolous pursuant to Fed. R. Civ. P. 11, alleges RICO violations, conspiracy to commit RICO violations, fraud, negligence and legal malpractice without any substantiation. For these reasons, Plaintiffs' Complaint must be dismissed with prejudice.

II. PROCEDURAL HISTORY AND BACKGROUND

On December 5, 2016, Jeffrey A. Winters and CSI filed a Complaint in the United States District Court, District of New Jersey against Marcus & Zelman, as well as other attorneys and law firms who have filed class action lawsuits against debt

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Hackensack Debt Collector Claims Attorneys Using Mafia Tactics, http://www.northjersey.com/story/news/2017/01/06/hackensack-debt-collector-claims-attorneys-using-mafia-tactics/96253802 (site last visited on January 18, 2017).

collectors who have repeatedly violated the FDCPA.[2] Marcus & Zelman filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on January 18, 2017.[3] Two days later on January 20, 2017, the Law Offices of Laura S. Mann, LLC and Laura S. Mann, Esq. (the "Mann Defendants") also filed a Motion to Dismiss.[4] Recognizing the likelihood that their original Complaint would be dismissed, Plaintiffs filed the Amended Complaint on February 6, 2017 followed by a RICO Case Statement on February 8, 2017.[5] The slight changes to the Complaint do nothing to save it from being dismissed and actually highlight exactly why it should be dismissed.

In the very first paragraph of the Complaint, Plaintiffs assert that Winters, CSI, and others "are victims of the actionable conduct which Defendant attorneys are alleged to have perpetrated."[6] Plaintiffs continue in the first paragraph asserting that the "particular actionable conduct" was Defendants' legal representation of plaintiffs (not Plaintiffs) in Juliette Chapa, et al. v. Charles I. Turner, Esq., et al. (the "Chapa Case").[7] Nowhere in the Complaint do Plaintiffs actually assert that Marcus & Zelman represented plaintiffs in the Chapa Case.[8]

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[2] See ECF No. 1.
[3] See ECF No. 19.
[4] See ECF No. 21.
[5] See Plaintiffs' First Amended Class Action Complaint attached to the Heines Cert. as Exhibit B; see also ECF No. 29.
[6] See Heines Cert., Ex. B, ¶1.
[7] Id.
[8] See Heines Cert., Ex. B.

With good reason too. Marcus & Zelman never represented any party in Chapa. Plaintiffs' Complaint does little more than establish that Marcus & Zelman, like hundreds of other law firms and lawyers in the Tri-State area, filed valid FDCPA lawsuits which does not form the basis for any actionable claims.

LEGAL ARGUMENT

INTRODUCTION

A. Standard of Review under Fed. R. Civ. P. 12(b)(6)

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) should be granted when the complaint does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A plausible claim is one which "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 672 (citations omitted). Plausibility requires more than a "sheer possibility that a defendant has acted unlawfully." Id. at 678. Rather, the "factual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007).

To survive dismissal under Rule 12(b)(6), a plaintiff must provide "direct or inferential allegations respecting all the material elements" of the claims. Twombly, 550 U.S. at 562. Specifically, a complaint must contain "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of" the necessary elements of the plaintiffs' cause of action. Id. at 556. This requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Id. at 555. Allegations that are merely "consistent with" unlawful conduct are insufficient to state a plausible claim where "more likely explanations" of lawful conduct exist. Iqbal, 556 U.S. at 678, 681.

A review of Plaintiffs' Complaint shows that this action must be dismissed as a matter of law because the factual allegations asserted against the Marcus & Zelman Defendants are nothing "more than an unadorned, the defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

B. Federal and New Jersey RICO Statutes

1. Heightened Scrutiny Must Be Applied to RICO Actions

The RICO provisions of the Organized Crime Control Act of 1970 were enacted expressly for the purpose of "seeking the eradication of organized crime in the United States." Beck v. Prupis, 529 U.S. 494, 496 (2000). RICO provides for a "civil cause of action 'for any person injured in his business or property by reason of a violation of [RICO]." Id. (quoting 18 U.S.C. §1964(c)).

"[I]n cases alleging civil RICO violations, particular care is required to balance the liberality of the Civil Rules with the necessity of preventing abusive or vexatious treatment of defendants." Miranda v. Ponce Federal Bank, 948 F.2d 41, 44 (1st Cir. 1991). "Civil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device." Id. "The mere assertion of a RICO claim consequently has an almost inevitable stigmatizing effect on those named as defendants…courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." Figuerora Ruiz v. Alegria, 896 F.2d 645, 650 (1st Cir. 1990).

Courts "must be wary of putative civil RICO claims that are nothing more than sheep masquerading in wolves' clothing." Kirk v. Heppt, 423 F.Supp. 2d 147, 149 (S.D.N.Y. 2006). "[I]t would be unjust if a RICO plaintiff could defeat a motion to dismiss simply by asserting an inequity attributable to a defendant's conduct and tacking on the self-serving conclusion that the conduct amounted to racketeering." Miranda, 948 F.2d at 44. The proliferation of groundless RICO claims "demonstrates how far afield we have wandered from the 'heartland' of Congress' initial intention for RICO actions. Instead of elements of organized crime being on trial…it is the public." Genty v. Resolution Trust Corp., 937 F.2d 899, 913 (3d Cir. 1991).

2. The Federal RICO Statute

In order to establish a *prima facie* showing under RICO, a plaintiff must show the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). "The plaintiff must, of course, allege each of these elements to state a claim." Id.

3. The New Jersey RICO Statute

The New Jersey RICO statute was largely patterned after the federal RICO statute. See Barr Labs, Inc. v. Bolar Pharm. Co., 1992 U.S.Dist. LEXIS 22883 at 29-30 (D.N.J. July 13, 1992)[9]. "[T]he language of the New Jersey counterpart of 18 U.S.C. § 1962, N.J.S.A. 2C:41-2, is identical in all material respects except that the New Jersey Act is directed toward enterprises engaged in or the activities of which affect 'trade or commerce,' not interstate or foreign commerce.' " Kievit v. Rokeach, 1987 U.S.Dist. LEXIS 16131, at *20-*21 (D.N.J. Oct. 29, 1987)[10]; New Jersey Office Supply, Inc. v. Feldman, 1990 U.S.Dist. LEXIS 6620, at *9 (D.N.J. June 4, 1990)[11]. "The virtual identity of the Federal and New Jersey RICO acts permits the Court to interpret them in a consistent manner." Kievit, 1987 U.S. Dist. LEXIS 16131, at *20-*21; Gilmore v. Berg, 761 F. Supp. 358, 375 (D.N.J. 1991).

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[9] A copy of the decision in Barr Labs, Inc. v. Bolar Pharm. Co., 1992 U.S.Dist. LEXIS 22883 (D.N.J. July 13, 1992) is attached to the Heines Cert. as Exhibit C.

[10] A copy of the decision in Kievit v. Rokeach, 1987 U.S.Dist. LEXIS 16131 (D.N.J. Oct. 29, 1987) is attached to the Heines Cert. as Exhibit D

[11] A copy of the decision in New Jersey Office Supply, Inc. v. Feldman, 1990 U.S.Dist. LEXIS 6620 (D.N.J. June 4, 1990) is attached to the Heines Cert. as Exhibit E.

To prove a cause of action under section 2C:41-2(c) of the New Jersey RICO Act, the plaintiff must demonstrate "(1) the existence of an enterprise, (2) that the enterprise engaged in or its activities affected trade or commerce, (3) that defendant was employed by, or associated with the enterprise, (4) that he participated in the conduct of the affairs of the enterprise, and (5) that he participated through a pattern of racketeering activity." State v. Ball, 141 N.J. 142, 181-187 (N.J. 1995).

As will be proven, both Plaintiffs' federal and state RICO claims fail to set forth a claim upon which relief can be granted and were only filed in order to set off "the litigation equivalent of a thermonuclear device" for the sole purpose of creating the "almost inevitable stigmatizing effect" on Marcus & Zelman. In order to prevent this "abusive or vexatious treatment" of Marcus & Zelman, the First, Second, Third, and Fourth Counts of Plaintiffs' Complaint must be dismissed.

POINT I

PLAINTIFFS CLAIMS ARE BARRED BY NEW JERSEY'S ABSOLUTE LITIGATION PRIVILEGE

The Plaintiffs' claims stem from the Defendants' filing of class action lawsuits. The litigation privilege bars these claims because if attorneys are not safeguarded from lawsuits arising from litigation they have instituted on behalf of clients, they will be forced to "work in constant fear of civil liability [and] it is the rights of the public that will suffer." See Loigman v. Twp. Comm., 185 N.J. 566, 584 (2004) (citing United States General Inc. v. Schroeder, 400 F.Supp.713, 717 (E.D. Wis. 1975)). This chilling effect with "critical social considerations" requires Plaintiffs' Complaint be dismissed based upon New Jersey's absolute litigation privilege. Id.

New Jersey's firmly established litigation privilege ensures that "[s]tatements by attorneys, parties and their representatives made in the course of judicial or quasi-judicial proceedings are absolutely privileged and immune from liability." Giles v. Phelan, Hallinan & Schmieg, L.L.P., 901 F.Supp. 2d 509 (D.N.J. 2012)(citing Peterson v. Ballard, 292 N.J.Super. 575, 581 (App. Div. 1996)). The privilege is expansive. New Jersey courts "have extended the reach of the litigation privilege even to statements made by attorneys outside the courtroom, such as in attorney interviews and settlement negotiations." Id. (citing Loigman, 185 N.J. at 588).

The privilege has four elements. It applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Id. (citing Hawkins v. Harris, 141 N.J. 207, 216 (1995)). "The spectrum of legal theories to which the privilege has been applied includes **negligence**, breach of confidentiality, abuse of process, intentional infliction of emotion distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations, and **fraud.”** Loigman, 185 N.J. at 583 (emphasis added).

It is clear for the purposes of this motion Marcus & Zelman's alleged conduct meets all the prongs articulated in Hawkins. First, the filing of and contents of the Complaints filed by Marcus & Zelman are protected because they were made in the course of a judicial proceeding. Second, Marcus & Zelman were an authorized participant to these various litigations as it was acting as counsel for its clients. Third, the filing of the Complaints in those actions was made to achieve the object of the litigation, i.e., the obtainment of a judgment and was therefore logically related to those actions. Accordingly, all of the allegations in the Complaint against Marcus & Zelman are barred, as a matter of law, by the litigation privilege and must be dismissed with prejudice.

POINT II

THE FIRST AMENDMENT RENDERS MARCUS & ZELMAN IMMUNE FROM STATUTORY RICO LIABILITY FOR FILING LAWSUITS ON BEHALF OF CLIENTS

While the litigation privilege may not apply to RICO claims, Marcus & Zelman have safe harbor from those claims under the Noerr-Pennington doctrine derived from the First Amendment guaranteeing the right of the people to petition the Government for redress of grievances. Under the Noerr–Pennington doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. This right includes litigation: "the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

While the Noerr-Pennington doctrine originally applied to anti-trust cases, it has been expanded by the courts, including the Third Circuit, "to offer protection to citizens' petitioning activities in contexts outside the antitrust area as well." We, Inc. v. City of Philadelphia, 174 F.3d 322, 326-27 (3d Cir. 1999). The District of New Jersey has extended this to attorneys who file litigation on behalf of their clients. See Giles v. Phelan, Hallinan & Schmieg, L.L.P., 2013 U.S.Dist. LEXIS 78161, * 16 (D.N.J. June 4, 2013)[12]. In Giles, the plaintiffs brought a proposed class action for damages under RICO because they alleged that the attorney defendants engaged in a scheme to prosecute fraudulent mortgage foreclosure lawsuits. Id. at *1. The basis of plaintiffs' claims were that the attorney defendants wrongfully and illegally filed a foreclosure Complaint in the bank's name against them "with the purpose of defrauding homeowners by obtaining property through false representations, including fraudulent court filings." Id. at *9. The Giles Court applied the Noerr-

[12] A copy of the decision in Giles v. Phelan, Hallinan & Schmieg, L.L.P., 2013 U.S.Dist. LEXIS 78161, * 16 (D.N.J. June 4, 2013) is attached to the Heines Cert. as Exhibit F.

Pennnington doctrine to the attorney defendants who had filed foreclosure litigation on behalf of a client and barred plaintiffs' claims. Id. at *25.

In order to overcome the immunity afforded to litigants by Noerr-Pennington, a plaintiff must establish the defendant's instigation of litigation was merely a "sham". Prof'l Real Estate Investors, Inc. v. Columbia Pictures, 508 U.S. 49, 60-61 (1993). To establish the litigation was a "sham", a plaintiff is required "to show not only that the litigation was objectively baseless, but also that the defendant subjectively intended to harm the plaintiff through the abuse of a governmental process itself, as opposed to harms flowing from the outcome of that process." Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass'n, 776 F.3d 1343, 1349-50 (Fed. Cir. 2014), cert. denied, 136 S.Ct. 119, 193 L.Ed.2d 208 (2015). To prove objective reasonableness, a plaintiff must prove "that no reasonable litigant could realistically expect success on the merits…" Prof'l Real Estate Investors, 508 U.S. at 60, n. 5. Only if a plaintiff shows the challenged litigation to be objectively meritless will a court consider the litigant's subjective motivations. Id. at 50.

Here, in the Complaint, Plaintiffs have failed to even identify a single lawsuit Marcus & Zelman were involved in for which Plaintiffs are being sued. Based on that simple factor alone, Plaintiffs' Complaint should be dismissed. However, even if one were to consider the Juliette Chapa, et. al. v. Charles I. Turner, Esq. lawsuit, which, again, Marcus & Zelman were not involved in, mentioned by Plaintiffs in their Complaint as being a frivolous action, their claims still fail because in point of fact the Chapa lawsuit was not frivolous.

According to the Chapa complaint, the plaintiff therein received a collection letter on the letterhead of Charles I. Turner, Esq.[13] The collection letter was dated October 29, 2014, and stated that Mr. Turner had been retained by his client to collect a debt owed by plaintiff.[14] The letter stated the amount the plaintiff owed and stated if payment was not received within 10 days a lawsuit would be filed by Mr. Turner or another attorney and the next correspondence the plaintiff received would be a summons and complaint.[15]

The Chapa complaint alleged that the plaintiff resided in Texas and that Turner was not admitted to practice law in Texas.[16] It further alleged no lawsuit was ever filed against plaintiff.[17] Plaintiff claimed the collection letter violated the FDCPA because a lawsuit against her could not legally be taken nor was one intended to be filed.

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[13] See Chapa Complaint attached to the Heines Cert. as Exhibit G; see also 2:15-cv-03125-JMV-MF, Docket 1, page 7, ¶32.
[14] Id., page 7, ¶34.
[15] Id., page 7, ¶36 - page 8, ¶37
[16] Id., page 2, ¶6, page 8, ¶40.
[17] Id., page 8, ¶39-42.

It is beyond dispute the complaint filed in Chapa was not a sham, i.e., where there was no possible scenario in which the allegations set forth could be deemed objectively baseless. The FDCPA specifically prohibits collection agencies from making "false threats to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. §1692e(5). The collection letter was issued by Turner on or about October 29, 2014. The Chapa complaint was not filed until May 4, 2015, over six months later. At the time the Chapa complaint was filed, no lawsuit had been filed against Chapa by Turner or anyone else despite the collection letter stating a lawsuit would be filed in payment was not received within 10 days. Based upon this background it is clear there was a colorable claim that the FDCPA was violated by Turner's collection letter.

The Noerr-Pennington doctrine accordingly requires dismissal of this action which takes issues with the putative class lawsuits filed by the various attorney defendants in this action. The Plaintiffs solely claim "the particular actionable conduct perpetrated by Defendants against Plaintiffs was the prosecution by Defendants of" the Chapa litigation. However, as discussed, Marcus & Zelman was not involved in that litigation. Even if Marcus & Zelman had been involved in that litigation it would still be protected from suit by the First Amendment and immune from suit under Noerr-Pennington.

POINT III

PLAINTIFFS LACK STANDING TO BRING THESE CLAIMS AGAINST MARCUS & ZELMAN

There is no case-or-controversy between Plaintiffs and Marcus & Zelman; therefore, the Complaint must be dismissed. Article III of the Constitution limits the scope of the Federal judicial power to the adjudication of "cases" or "controversies." U.S. Const. art. III, §2. The courts have developed several justicability doctrines to enforce the case-or-controversy requirement, and "perhaps the most important of these doctrines" is the requirement that "a litigant have 'standing' to invoke the power of a federal court." Allen v. Wright, 468 U.S. 737, 750 (1984). "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 501 (1975).

The plaintiff bears the burden of meeting the "irreducible constitutional minimum" of Article III standing by establishing three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before

> the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)

To satisfy the injury in fact requirement, the alleged injury must be "particularized," in that it "must affect the plaintiff in a personal and individual way." Id. at 560, n.1. The injury in fact test requires the plaintiff seeking redress being amongst the injured. Id. at 563. Furthermore, the "standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Allen, 468 U.S. at 752.

Here, Plaintiffs cannot prove and, in fact, do not even allege injury in fact to vault the federal standing requirements. There is no allegation contained anywhere in Plaintiffs' seventeen page Complaint which would allow an objective reader to surmise that Marcus & Zelman caused Plaintiffs any injury whatsoever.

Instead, Plaintiffs seek to lump Marcus & Zelman in with other Defendant attorneys who filed the Chapa lawsuit against Plaintiffs. This is not an appropriate avenue to bring standing. In this instance, Plaintiff is not among the injured by Marcus & Zelman. Marcus & Zelman took no action or inaction to cause Plaintiffs any damage at all and none is alleged in the Complaint. As Plaintiffs lack standing to bring any claims against Marcus & Zelman, the Complaint must be dismissed.

POINT IV

PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PLAUSIBLE CLAIM THAT MARCUS & ZELMAN VIOLATED STATE AND FEDERAL RICO STATUTES

Plaintiffs have failed to present "direct or inferential allegations respecting all the material elements" necessary to present a plausible claim that Marcus & Zelman violated state and federal RICO statutes. See Twombly, 550 U.S. at 562. Based upon a plain reading of Plaintiffs' Complaint and based only upon the "well-pleaded factual allegations," which the court should assume are true, Plaintiffs fail to even make a rudimentary claim against Marcus & Zelman. See Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010). Nowhere in Plaintiffs' Complaint, do Plaintiffs identify (1) any criminal enterprise Marcus & Zelman were involved in, (2) any predicate acts of racketeering activity that they engaged in, or (3) any conspiracies they sought to advance.

A. Plaintiffs' Complaint Fails to Identify Any Criminal "Enterprise" Marcus & Zelman Were Involved In

Plaintiffs fail to plausibly set forth the conduct of any "enterprise" between Marcus & Zelman and any other entity. A proper RICO claim must allege "the existence of two separate entities, a 'person' and a distinct 'enterprise,' the affairs of which that 'person' improperly conducts." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001). Under RICO, a "person" is defined to include "any individual or entity capable of holding a legal or beneficial interest in property…."

18 U.S.C. §1961(3). Under §1962(a), the "person" must have "participated as a principal . . . in the establishment or operation" of an enterprise. Pursuant to §1962(c), the "person" must be "employed by or associated with" an enterprise. The "enterprise" itself, by contrast, is defined in the statute to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." 18 U.S.C. §1961(4).

While there is little doubt that Marcus & Zelman constitute a "person" under RICO, Plaintiffs' Complaint is absolutely devoid of any allegations establishing an enterprise, let alone an enterprise the affairs of which Marcus & Zelman improperly conducted. The amorphous "enterprise" pled in Plaintiffs' Complaint is not a legal entity, but an association of legal entities. Where it is pled that the "enterprise" is not a legal entity, but an association of legal entities, "listing the names of alleged conspirators would not give defendants adequate notice of an alleged conspiracy" is insufficient. In re Brokerage Antitrust Litig., 618 F.3d 300, 369-70 (3d Cir. 2010). Plaintiffs must "provide more detail in pleading the existence of an association-in-fact enterprise." Id. (citations omitted).

A RICO claim must plead facts plausibly implying the existence of an enterprise with at least the following structural attributes: "a shared purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Id. It is mandatory at the pleading stage that a plaintiff plausibly suggest the existence of an enterprise structure. In doing so, a plaintiff must "allege something more than the fact that individuals were all engaged in the same type of illicit conduct during the same time time period . . . regardless of whether there is even a hint of the collaboration necessary to trigger liability." In re Brokerage Antitrust Litig., 618 F.3d at 370 (citing Elsevier Inc. v. W.H.P.R., Inc., 692 F.Supp. 2d 297, 307 (S.D.N.Y. 2010)).

Despite the fact that Plaintiffs have amended their Complaint, they fail to allege anything more than Marcus & Zelman were attorneys who were part of some nebulous enterprise which filed class action lawsuits simply to collect attorney's fees. The only changes made to the Complaint with respect to the RICO enterprise allegations were the inclusion of more of the same generalities the original Complaint was founded on. They still fail to plea what was necessary to prove a RICO enterprise. The general inclusions in the Amended Complaint are particularly egregious considering that Plaintiffs did not make the effort to actually amend their pleading to include what the law requires.

As the allegations of an Enterprise are based upon nothing more than sweeping statements, it almost does not bear stating that the allegations are absolutely fabricated. Plaintiffs barely attempt to make even a cursory allegation of a RICO Enterprise's existence. As close as Plaintiffs get to stating something, anything, is in paragraph 14 of the Complaint where they accuse the Defendants have "work[ing] together and shar[ing] common professional plaintiffs, shar[ing] a common format for their pleadings, follow[ing] the same procedure in settling their lawsuits, and even [holding] legal seminars together."

1. There Is No Relationship Between Marcus & Zelman And The Other Defendants To Establish A RICO Enterprise

Plaintiffs have identified one solitary case where Marcus & Zelman worked with any of the other Defendants. In Abramov v. I.C. System Inc., (2:14-cv-04000-ADS-ARL), Jones filed a Class Action Complaint on June 26, 2014 alleging FDCPA violations.[18] . Marcus entered a Notice of Appearance two months later on August 20, 2014.[19] Despite the multitude of repetitive comments regarding the spurious nature of any of the lawsuits Defendants were involved in, the Jones Defendants and Marcus & Zelman survived not one, but two separate motions to dismiss in

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[18] See Abramov Complaint attached to the Heines Cert. as Exhibit H; see also 2:14-cv-04000-ADS-ARL, ECF No. 1. In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may only consider the complaint, exhibits attached to the complaint, matters of public record, and undisputably authentic documents if the complainant's claims are based upon those documents. See PBGC v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993); see also In re Burlington Coat Factory Sec. Lit, 114 F.3d 1410, 1426 (3d Cir. 1997)(a document forms the basis of a claim when it is "integral to or explicitly relied upon in the complaint" and such a document "may be considered without converting the motion to dismiss into one for summary judgment."). The Abramov documents cited herein are both matters of public record and undisputably authentic documents upon which Plaintiffs' claims are based. Therefore, the motion need not be converted to one for summary judgment.

[19] See Marcus & Zelman's Notice of Appearance in Abramov attached to the Heines Cert. as Exhibit I; see also 2:14-cv-04000-ADS-ARL, ECF No. 10.

Abramov. There, knowing plaintiff "brought this class action lawsuit on behalf of himself and a proposed nationwide class seeking redress for certain actions . . . allegedly in violation of the" FDCPA, the Honorable Arthur D. Spatt, U.S.D.J., found that plaintiff could advance the theory, under the FDCPA, that the defendant misled plaintiffs leaving them unsure as to whether disputing a debt requires oral or written communication.[20] Further, Judge Spatt found that plaintiff "adequately plead materiality."[21]

Thereafter, defendants took a second bite at the apple filing a motion to dismiss for lack of subject matter jurisdiction.[22] Consistent with what Plaintiffs, here, allege, the defendant in Abramov asserted plaintiff failed to allege "actual damages." Judge Spatt again found in favor of plaintiff, the Defendants' client, that "as a matter of law, the Plaintiff has adequately plead 'actual damages' under the FDCPA."[23]

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[20] See Judge Spatt's October 14, 2014 Decision and Order in Abramov attached to the Heines Cert. as Exhibit J; see also 2:14-cv-04000-ADS-ARL, ECF No. 15, pages 1-2; 15.
[21] Id. at page 15.
[22] See Judge Spatt's December 12, 2014 Decision and Order in Abramov attached to the Heines Cert. as Exhibit K; see also 2:14-cv-04000-ADS-ARL, ECF No. 25, pages 1-2; 15.
[23] Id. at page 7.

Therefore, in the one and only case where Plaintiffs linked Defendants, they represented a class in an objectively valid litigation which survived two separate motions to dismiss.

2. Plaintiffs Failed To Plead A Cognizable Shared Purpose

The alleged shared purpose of the Enterprise was to file class action lawsuits against debt collectors who violated the FDCPA. Unfortunately for Plaintiffs, this is not an actual shared purposed of any criminal enterprise because Marcus & Zelman were merely representing their clients within the parameters set forth by the Fair Debt Collection Practices Act and the Federal Rules of Civil Procedure. Under Fed. R. Civ. P. 23(b)(3), a class action may be maintained if common questions of law or fact predominate over questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The FDCPA allows for class-wide recovery as "any debt collector who fails to comply with [the FDCPA] with respect to any person is liable to such person in an amount equal to the sum of . . . in the case of a class action, (i) such amount for each named plaintiff as could be recovered [in any action by an individual, such additional damages as the court may allow, but not exceeding $1,000], and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector . . . ." 15

U.S.C. §1692k(a)(2)(B). The Third Circuit has recognized the special relationship FDCPA claims have with the class action mechanism noting that class actions are "fundamental to the statutory structure of the FDCPA." Weiss v. Regal Collections, 385 F.3d 337, 345 (3d Cir. 2004).

Congress clearly contemplated that this procedural mechanism would be used to bring FDCPA claims, as evidenced by the Act itself and its legislative history. First, Congress specifically provided for class damages in the FDCPA. See 15 U.S.C. § 1692k(a)(2)(B) (establishing a cap on damages in FDCPA class actions). Second, Congress intended for the FDCPA to be self-enforcing. Weiss, 385 F.3d at 345; see also Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991) (The FDCPA "mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general."). As the Third Circuit has recognized, without the class action device, "meritorious FDCPA claims might go unredressed because the awards in an individual case might be too small to prosecute an individual action." Weiss, 385 F.3d at 345. A class action's proffer of a means for "[c]ost-spreading can also enhance the means for private attorney general enforcement and the resulting deterrence of wrongdoing." In re Gen. Motors Corp., Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995).

Despite the clear mandate from Congress and the Third Circuit's interpretations, Plaintiff and their counsel seek to criminalize and stigmatize Marcus & Zelman through civil RICO claims for essentially acting as private attorneys general for violated consumers as precisely envisioned by the Act. As in Morrow, Marcus & Zelman were legally acting in the course of legal representation which cannot give rise to RICO liability. Plaintiffs' lack of any facts or grounds to name Marcus & Zelman as a defendant in this action under any theory, for simply representing their clients as envisioned by Congress, is not only reprehensible, but sanctionable.

3. As Plaintiffs Only Point To One Instance Of Joint Representation, They Cannot Ever Hope To Prove Longevity

The only case where Plaintiffs allege that Marcus & Zelman acted in concert with any other Defendant is Abramov which was filed on June 26, 2014. There is no case thereafter where Plaintiffs assert Marcus & Zelman was involved with the other Defendants. Based on this factor alone, Plaintiffs cannot prove the longevity pleading requirement.

B. Plaintiffs' Complaint Fails to Plead Any Predicate Acts of Racketeering Activity

Plaintiffs have failed to plausibly plead that Marcus & Zelman committed any criminal offenses which would constitute "predicate acts" of "racketeering activity." Amongst other elements, a plaintiff must successfully plead and prove a pattern of racketeering activity. See Sedima, 473 U.S. at 496. A pattern of racketeering activity is established by showing that the defendants engaged in at least two predicate acts within ten years of each other. 18 U.S.C. §1961(1), (5); In re Ins. Brokerage Antitrust Litig., 618 F.3d at 364. An act of "racketeering activity" is defined in RICO to mean 'any act or threat involving' specified state-law crimes, any 'act' indictable under various specified federal statutes, and certain federal 'offenses.'" N.J.Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 232 (1989).

It is black letter law that in order for the Plaintiffs' RICO claims to stand, the Complaint must sufficiently allege that two criminal predicate acts were committed by the RICO participants. The Plaintiffs have been unable to set forth any such criminal predicate acts, because they simply do not exist. To be sure, the Plaintiffs facially attempt to comply with their pleading requirements, by baldly asserting that the Defendants' actions violated 18 U.S.C. §1343 (Wire Fraud); 18 U.S.C. §1503 (Obstruction of Justice); 18 U.S.C. §1511 (Obstruction of State Law Enforcement); 18 U.S.C. §1512 (Witness Tampering); 18 U.S.C. §1951 (Extortion and other Federal Statutes); N.J.S.A. 2C:20-5 (Theft by Extortion); N.J.S.A. 2C:20-4 (Theft by Deception) and N.J.S.A. 2C:21-7 (Deceptive Business Practices). See Complaint, pages 14-20.

"It is not enough for a plaintiff to file a RICO action, chant the statutory mantra, and leave the identification of predicate acts to the time of trial." Feinstein v. Resolution Trust Corp., 942 F.2d 34, 42 (1st Cir. 1991). There is zero basis in the

Complaint to support a claim that the Defendants violated any criminal offense enumerated above or otherwise. Where, as here, Plaintiffs tendered "'naked assertions' devoid of any 'factual enhancement,'" Iqbal, 556 U.S. 662 (quoting Twombly, 550 U.S. at 557), their civil RICO claim is patently deficient and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

1. The Alleged Predicate Acts Were Congressionally Permissible

The predicate acts for each alleged crime is Defendants filing and settling of class action lawsuits on behalf of their clients based upon debt collectors' FDCPA violations. As argued *supra*, it is evident that Congress intended for lawyers to bring class action lawsuits on behalf of their clients, and the class, as class action lawsuits are "fundamental to the statutory structure of the FDCPA." Weiss, 385 F.3d at 345. Further, there is a strong judicial policy in favor of parties voluntarily settling lawsuits. Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982). To this end, the Pennwalt Court noted:

> Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Id.

Therefore, based upon Plaintiffs' Complaint, they allege the predicate acts establishing a pattern of racketeering activity which is a Congressionally approved method of filing FDCPA class action lawsuits and the judicially favored method of settling those Congressionally approved lawsuits. The attempt to establish Defendants' actions as predicate acts is nonsensical. Based on the foregoing, Plaintiffs cannot and will never be able to establish predicate acts.

2. Wire Fraud and Other Alleged Federal Criminal Actions

The federal wire fraud statutes prohibit the use of the interstate wires for purposes of carrying out any scheme or artifice to defraud. See 18 U.S.C. §§ 1341, 1343. "A scheme or artifice to defraud need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentation or omission reasonably calculated to deceive persons of ordinary prudence and comprehension." Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 528 (3d Cir. 1998) (quoting Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1415(3d Cir. 1991)).

a. Defendants' litigation activities cannot be predicate acts of wire fraud

As noted in the Jones Defendants' Memorandum of Law to support their motion to dismiss, the filing of a Complaint, or any other pleading, cannot constitute a predicate act of wire fraud to support a civil RICO claim. As the Eleventh Circuit has noted, "[a] number of courts have considered whether serving litigation documents by mail can constitute mail fraud, and **all** have rejected that possibility." United States v. Pendergraft, 297 F.3d 1198, 1208 (11th Cir. 2002) (emphasis added). Concurring, the District of Delaware found it "absurd" to suggest that a lawyer's litigation activities could constitute mail fraud. Paul S. Mullin & Assocs. V. Bassett, 632 F.Supp. 532, 540 (D.Del. 1986).

The sister court in the Eastern District of Pennsylvania has specifically dealt with the exact scenario Plaintiffs present to this Court. Nolan v. Galaxy Scientific Corp., 269 F.Supp. 2d 635, 643 (E.D.Pa. 2003). In Nolan, the plaintiff claimed that the documents filed by an attorney constituted mail fraud and asked the court to decide that the filing of litigation documents known to contain falsehoods constituted predicate acts under RICO. Id. Consistent with other courts, the Eastern District of Pennsylvania ruled, "[s]uch a decision would have sweeping consequences indeed, potentially permitting any litigant to allege that the opposing party's submissions . . . were false and therefore constituted mail fraud." As such, the Court was "unwilling to expand RICO liability for mail fraud in such a dramatic fashion as to include litigation papers . . . ." Id.

The chilling effect referred to by the Nolan Court, is the precise impact that Plaintiffs, debt collectors, intend to make. This groundless lawsuit has been filed for the sole purpose of frightening attorneys from filing objectively valid FDCPA claims against debt collectors and their ilk. The Eastern District of Pennsylvania has rejected this notion along with a myriad of other jurisdictions. This Court too, should follow the majority and reject Plaintiffs' claims.

b. Plaintiffs fail to plead wire fraud with the required specificity

Where, as here, plaintiffs claim wire fraud as the predicate act for their RICO claim, "the allegations of fraud must be pled with specificity." Lum v. Bank of Am., 361 F.3d 217, 223(3d Cir. 2004). RICO allegations sounding in fraud are subject to the heightened pleading standards of Rule 9(b). Id. at 223-24. "Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Walter v. Palisades Collection, LLC, 480 F. Supp. 2d 797, 802 (E.D. Pa. 2007), (citing Seville, 742 F.2d at 791).

Under Federal Rule of Civil Procedure 9(b), plaintiffs must plead "the who, what, when, where, and how: the first paragraph of any newspaper story." In re Advanta Corp. Sec. Litig., 180 F.3d 525, 534 (3d Cir. 1999), abrogated on other grounds by City of Roseville Emples. Ret. Sys. v. Horizon Lines, Inc., 713 F. Supp. 2d 378 (D. Del. 2010) (citation omitted). Moreover, Plaintiffs must plead RICO predicate acts "with particularity with respect to *each defendant*, thereby informing *each defendant* of the nature of *its* alleged participation in the fraud." Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 492 (D.N.J. 1998) (citation omitted) (emphasis added). Plaintiffs may satisfy this requirement by pleading the "date, place or time" of the fraud, or through "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." Seville, 742 F.2d at 791. As alternatively stated, "[w]ithout pleading that a specific mailing occurred, the author and recipient of the mailing, as well as the contents of the mailing, cannot be pleaded. Therefore, mail fraud cannot be pleaded. Similarly, failing to plead a specific phone conversation, and the participants and contents of that conversation, means that wire fraud is not pleaded." B.V. Optische Industrie De Oude Delft. V. Hologic, Inc., 909 F.Supp. 162, 169 (S.D.N.Y. 1995).

Plaintiffs allege Marcus & Zelman's racketeering acts involve wire fraud consisting of filing 247 federal lawsuits through ECF. However, Plaintiffs fail to allege how many of those filings were FDCPA class action lawsuits. The only specific case that they reference involves Marni Truglio. It is important to note that Plaintiffs were not defendants in any Truglio case. Plaintiffs use Truglio for the purported purpose of establishing that Marcus & Zelman file sham class action FDCPA lawsuits with professional plaintiffs which are shared amongst the Defendants. Even a casual observation of these public records, which Plaintiffs rely upon in their pleadings, reveals it is untrue and, in fact, the Truglio cases support the reasons why Marcus & Zelman must be dismissed.

According to PACER, and as pointed out in Plaintiffs' Complaint, Truglio has filed six federal lawsuits[24].

a. Truglio v. Credit Collection Services[25]

On May 12, 2014, Marcus & Zelman, on behalf of Truglio filed Truglio v. Credit Collection Services. This case was based on FDCPA violations, but was **not** a class action and was settled on or about July 14, 2014.

b. Truglio v. Keystone Financial Services[26]

On June 17, 2014, Marcus & Zelman, on behalf of Truglio filed Truglio v. Keytone Financial Services. This case was based on FDCPA violations and was a class action lawsuit. It settled on or about October 23, 2014.

c. Truglio v. Portfolio Recovery Associates[27]

On October 22, 2014, Marcus & Zelman, on behalf of Truglio filed Truglio v. Portfolio Recovery Associates. This case was based on FDCPA violations and was a class action lawsuit. It settled on or about December 29, 2014.

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[24] The Truglio documents cited herein are both matters of public record and undisputably authentic documents upon which Plaintiffs' claims are based. See White Consolidated Industries, Inc., 998 F.2d at 1196. Therefore, the motion need not be converted to one for summary judgment.

[25] See Truglio v. Credit Collection Services Docket Report attached to the Heines Cert. as Exhibit L.

[26] See Truglio v. Keystone Financial Services Docket Report attached to the Heines Cert. as Exhibit M.

[27] See Truglio v. Portfolio Recovery Assocaties Docket Report attached to the Heines Cert. as Exhibit N.

d. Truglio v. CBE Group[28]

On June 8, 2015, Marcus & Zelman, on behalf of Truglio filed Truglio v. CBE Group. This case was based on FDCPA violations and was a class action lawsuit. After nearly fifteen months of litigation, Marcus & Zelman filed a Motion to Certify Class on behalf of Truglio. The defendant filed opposition, a reply was filed, and oral argument was held. On December 1, 2016, the Honorable Peter Sheridan issued the Court's opinion on plaintiff's motion to certify class.

The defendant in CBE Group had numerous objections to class certification. The first was that plaintiff did not suffer any injury and, therefore, had no standing. Judge Sheridan quickly dismissed that notion by following Third Circuit precedent which finds an injury when a plaintiff's status as a debtor is disclosed to the public. Thus, he found that plaintiff had "shown an injury and has standing."

Additionally, CBE Group argued, much like Plaintiffs here, that Truglio could not serve as lead plaintiff because she was a "chronic litigation filer" or professional plaintiff. [29] CBE Group even pointed out that Marcus & Zelman had previously represented Truglio. Judge Sheridan appropriately found that Truglio's status as a chronic litigation filer had no impact on liability because the question before him

[28] See Truglio v. CBE Group Docket Report attached to the Heines Cert. as Exhibit O.
[29] See Judge Sherdian's December 1, 2016 Opinion on Plaintiff's Motion to Certify Class in CBE Group, 4:13-20. attached to the Heines Cert. as Exhibit P; see also 3:15-cv-3813-PGS-TJB, ECF No. 33.

was whether her personal information as a debtor was made public.[30] Moreover, because Truglio sought "statutory damages as opposed to actual damages" the Court was required to "focus on the elements [and factors of damages] set forth by Congress rather than looking at the serial litigation characterization."[31]

The court then went through the elements of class certification finding that Truglio had proven numerosity[32], commonality[33], typicality[34], and adequacy of representation[35]. It was also established that "questions of law and fact common to the class members predominate over any question affecting the individual members; and the class action is superior to other methods for fairly and efficiently adjudicating the controversy."[36] It also bears noting that Judge Sheridan found with respect to adequacy of representation that Marcus & Zelman "are qualified and experienced in consumer action lawsuits" and were "more than adequate to represent the plaintiff and the class."[37] Based on the foregoing, Judge Sheridan granted the motion to certify the class.[38]

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[30] Id., 5:9-11.
[31] Id., 5:13-6:16.
[32] Id., 8:24-9:2.
[33] Id., 9:2-21.
[34] Id., 9:22-10:19.
[35] Id., 10:20-23.
[36] Id.,. 8:5-12; 12:2-3.
[37] Id., 10:22-23.
[38] Id., 12:2-3.

As of February 17, 2017, nearly two years late after the complaint was filed, Marcus & Zelman were actively litigating the case on behalf of the class.

e. Truglio v. Planet Fitness, Inc., et al.[39]

On September 28, 2015, the Jones Defendants, on behalf of Truglio filed Truglio v. Planet Fitness, Inc. in State Court. It was removed to Federal Court on November 6, 2015. This case was **not** based on FDCPA violations, but violations of the Health Club Services Act (N.J.S.A. 56:8-39, *et seq.*), the Consumer Fraud Act (N.J.S.A. 56:8-1, *et seq.*), and Truth-in-Consumer Contract, Warranty and Notice Act (N.J.S.A. 56:12-14 to -18. This was a class action lawsuit. Marcus & Zelman did not represent Truglio as they do not represent clients based upon the alleged violations.

f. Truglio v. Summary Judgment Recovery[40]

On February 29, 2016, Marcus & Zelman, on behalf of Truglio filed Truglio v. Summary Judgment Recovery. This case was based on FDCPA violations and was **not** a class action lawsuit. After default was entered against Summary Judgment Recovery, the matter settled on or about November 21, 2016.

g. Summary of Truglio Cases

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[39] See Truglio v. Planet Fitness, Inc. Docket Report attached to the Heines Cert. as Exhibit Q.

[40] See Truglio v. Summary Judgment Recovery Docket Report attached to the Heines Cert. as Exhibit R.

Plaintiffs purport to use Truglio as proof that Marcus & Zelman filed sham class action lawsuits and were involved in an enterprise with the other Defendants. The Truglio cases do not support Plaintiffs.

Of the six cases Truglio filed and which Plaintiffs repeatedly referred, only three were FDCPA class action lawsuits. Of those three FDCPA class action lawsuits where Marcus & Zelman represented them, defendants decided to settle two of those matters before Marcus & Zelman had the opportunity to file a Motion to Certify Class. In the **only** case where Marcus & Zelman filed a Motion to Certify Class on behalf of Truglio, the Court **granted** that motion and, in doing so, the Court found Marcus & Zelman "are qualified and experienced in consumer action lawsuits." Therefore, any allegation that the Truglio cases were somehow sham lawsuits filed on behalf of a professional plaintiff which would in any way, shape or form, support Plaintiffs' racketeering allegations should be quickly dismissed without aforethought.

Other than a single conclusory statement alleging that the Defendants engaged in "Wire Fraud", Plaintiffs do not explain *how* the Defendants engaged in Wire Fraud. This does not pass muster under the pleading requirements set forth FRCP 8, and certainly cannot comply with the heightened pleadings requirements of FRCP 9. The Complaint makes no mention of the use of the mails to further the alleged RICO enterprise, nor does it make a single reference to any use of a wire used in furtherance of this alleged scheme.

Rather than explain "the who, what, when, where, and how" to properly put Defendants on notice of the fraud claims, Plaintiffs merely offer an allegation that the Defendants engaged in Mail or Wire Fraud. The pleading therefore does not sufficiently allege a predicate criminal act. Other than the single use of the terms "Mail Fraud" and "Wire Fraud", the Complaint is devoid of a single use of the word "mail", "postal" or "wire". There are no specific mailings alleged, authors or recipients identified, or the contents of the mailings divulged. Further, no specific phone conversations are even referenced and no participants or contents of those phone conversations are identified.

Without such a basic factual allegation, the Defendants and this Court cannot possibly know what fraudulent communications are being complained of, whether the Plaintiff ever relied on those fraudulent communications, and whether those fraudulent communications were in furtherance of the RICO scheme. This lack of specificity requires this Court to find that Plaintiff has failed to allege the predicate act of fraudulent practices adequately, in accordance with Rule 9(b)'s pleading requirements"). This is particularly pressing here, where Marcus & Zelman have never engaged in any mail or wire communications with the Plaintiffs, or with a Court in a case involving the Plaintiffs.

The Plaintiffs' conclusory statements that the Defendants engaged in "Obstruction of Justice", "Obstruction of State law enforcement", "Witness tampering", "Fraud and misuse of documents" and "Extortion and other Federal Statutes" similarly must fail. The Plaintiffs do not allege anywhere how the Defendants engaged in these various crimes, or provide any details backing up these conclusory statements, in order to satisfy the minimum pleading requirements of Rule 8.

3. Theft by Extortion

The basis of Plaintiffs' Complaint that Marcus & Zelman extorted them is the "filing of bogus and sham class actions."[41] To wit, nowhere in the Complaint do Plaintiffs ever allege that Marcus & Zelman actually filed a class action lawsuit against them – let alone a bogus or sham class action. Regardless, even assuming Defendants filed a bogus and sham class action against Plaintiffs, the allegation fails as a matter of law. The courts have made clear that filing lawsuits – even frivolous and baseless suits – does not qualify as 'extortion' sufficient to constitute a predicate violation for RICO purposes. See Deck v. Engineered Laminates, 349 F.3d 1253, 1258 (10th Cir.2003); see also Vemco, Inc. v. Camardella, 23 F.3d 129, 134 (6th Cir.1994); I.S. Joseph Co., Inc. v. J. Lauritzen A/S, 751 F.2d 265, 267–68 (8th Cir.1984); First Pac. Bancorp, Inc. v. Bro, 847 F.2d 542, 547 (9th Cir.1988). Consistent with

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[41] See Heines Cert., Ex. B,, p. 20, ¶35.

Marcus & Zelman's concerns and fears, the United States Court of Appeals for the Tenth Circuit has found that "[t]reating meritless litigation as a form of extortion punishable by RICO would substantially chill even valid court petitioning." Content Extraction, 776 F.3d at 1359, n.2 (citing Deck, 349 F.3d at 1258).

Even where frivolous litigation occurs on a "grand scale," it cannot "constitute the predicate act of extortion for purposes of the plaintiffs' civil RICO claim." Town of Gulf Stream v. O'Boyle, 654 Fed. App'x 439, 444 (11th Cir. 2016). In O'Boyle, the defendants pummeled a small town of under 1,000 residents with nearly 2,000 public record requests, many of which were frivolous, with no intention of reviewing the results. Id. at 441. The intention was to trigger a violation of Florida's Public Record Act and then threaten to or file a lawsuit which could entitle defendants to prevailing party attorneys' fees under the act. Id. The defendants then demanded unreasonable settlement demands and threatened to file more frivolous records requests if the town did not settle the claims. From 2013 through June 2016, defendants filed 43 public records suits against the town. Id. at 441-42.

Given the clear intent and purpose of the frivolous litigation in O'Boyle, the 11th Circuit Court of Appeals still found that "citizens have a constitutional right to petition the government for redress. We believe that regardless of the scope and scale of litigation, the courts are amply equipped to deal with frivolous litigation" through federal and state rules. Id. at 444. That is why courts have refused to "recognize[e] abusive litigation as a form of extortion [because doing so] would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO claim." Deck, 349 F.3d at 1258.

That the filing of a frivolous lawsuit cannot sustain a RICO claim is made clear from a review of the legislative history of the statute. In Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 486-88 (1985), the Supreme Court discussed at length the legislative history behind RICO's provision of civil remedies. The court explained that during debate, the House of Representatives "rejected a proposal to create a complementary treble-damages remedy for those injured by being named as defendants in malicious private suits." Sedima, 473 U.S. at 487. That amendment would have provided that "any such person who brings a frivolous suit, or a suit for the purpose of harassment, shall be subject to treble damages for injury to the defendant or to his business or property." 116 Cong. Rec. 35342, at *35295 (1970). During congressional debate on this amendment, Representative Abner J. Mikva explained as follows:

> My amendment is a perfecting amendment. I argue that I thought the entire title should be struck.
>
> What my amendment says is that at least we ought to protect the innocent businessman from some harsh competitor who seeks to abuse this section by filing frivolous lawsuits against him.... Whether he recovers money or not, [the frivolous filer] will have done a pretty good job of besmirching the business reputation of his competitor. This amendment says that if it turns out that the suit is frivolous or

> filed for the purpose of harassment, the defendant ought to be entitled to recover treble damages or any damage that he suffered to his business or his property.

See, 116 Cong. Rec. 35342, at *35295 (1970).

As noted above, this amendment was considered and then expressly rejected by Congress. Congress' express intent in excluding such litigation from the reach of RICO was found to be dispositive in Holloway v. Clackamas River Water, 2014 U.S. Dist. LEXIS 172346 (D. Or. Sept. 9, 2014) report and recommendation adopted, 2014 U.S. Dist. LEXIS 170616 (D. Or. Dec. 9, 2014). In Holloway, the court noted "that Congress rejected Representative Mikva's amendment evidences a congressional intent to exclude malicious lawsuits from the definition of "racketeering activity" which would give rise for a civil claim under RICO." Id., at 25. The Holloway court accordingly dismissed the RICO claims in that action, concluding that "to the extent Holloway's civil RICO claims are premised on the Defendants' many lawsuits, her claims fail." Id.

It is plainly evident that Plaintiffs cannot sustain a RICO claim with a predicate act of extortion where the alleged extortion is strictly based upon Defendants "filing bogus and sham class actions." Based on the foregoing, the Court should dismiss Plaintiffs' Complaint.

4. Theft by Deception

Plaintiffs, yet again, fail in asserting theft by deception as a predicate act to their RICO claims. A person is guilty of theft under N.J.S.A. 2C:20-4 if: (1) he makes a misrepresentation; (2) the misrepresentation is "knowing and made with the specific intent to cheat or defraud"; (3) 'the aggrieved party . . . [relied] on the misrepresentation in parting with his property'; and (4) the defrauding party 'received something of value as a result of the misrepresentation.' Zanger v. Bank of Am., N.A., 2011 U.S.Dist. LEXIS 88497, *15-16 (D.N.J. August 10, 2011) (citing State v. Cox, 150 N.J.Super. 599 (Law Div. 1977)). As a crime based on fraud, "a plaintiff must comply with Rule 9(b)'s heightened pleading requirements." Id. at *16.

The extent of Plaintiff allegation of fraud is that "in this case Defendant attorneys purposely and unlawfully represent to the Court and Counsel that they are pursuing putative class actions in good faith when in fact the basic and sole motivation was prospective class action attorney's fees."[42] In making this claim, Plaintiffs fail to properly allege that Marcus & Zelman violated N.J.S.A. 2C:20-4. Plaintiffs do not identify a single misstatement made by Defendants or that Plaintiffs relied on such misrepresentation "in parting with their property." Based on those factors alone, Plaintiffs cannot prove theft by deception as a predicate act.

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[42] See Heines Cert., Ex. B,, p. 20, ¶35.

However, consistent with the position courts have taken with extortion, criminal fraud claims forming a predicate act for RICO which are based on nothing more than the filing of a lawsuit could have a harsh impact on debtors with FDCPA claims by inhibiting or discouraging their legitimate exercise of rights granted by Congress. In so recognizing, the North District of Illinois has remarked "the Court fails to see how filing lawsuits constitutes fraud. One suspects that if the lawsuits were fraudulent, [the defendant] would not be winning any of the lawsuits. One suspects that if the lawsuits were frivolous, [the defendant] would be sanctioned by the Courts in which the suits were filed." Rechanik v. Microsoft Corp., 2009 WL 721005, *4 (N.D.Ill., March 17, 2009). The District Court then declined to allow the plaintiffs an opportunity to amend their Complaint, concluding that "the Court fails to see how the alleged conduct could ever support a RICO claim." Id.

The Plaintiffs appear to want to make much ado of the hundreds of cases filed by Marcus & Zelman on behalf of consumers across the country. However, not once has Marcus or Zelman been sanctioned or reprimanded for the filing of baseless or frivolous litigation. Instead, Marcus & Zelman has adeptly litigated these claims at all stages, from discovery through motion practice, achieving substantial success in a majority of these actions. Plaintiffs' conclusory assertion that Marcus & Zelman have falsely represented their good faith in bringing these lawsuits is not supported by any plausible allegations showing that to be true.

5. Deceptive Business Practices

It is difficult to fathom how Plaintiffs intended to survive a motion to dismiss alleging deceptive business practices as a RICO predicate act. Specifically, Plaintiffs allege that Marcus & Zelman violated N.J.S.A. 2C:21-7 (b), (e). Section (b) makes it a criminal offense to sell, offer or expose for sale, or deliver less than the represented quantity of any commodity or service. Given that Defendants do not deal in commodities, that clearly does not apply. As to the statute applying to services, we cannot comprehend how it would remotely apply to the practice of law. However, even assuming it did apply, it would only apply to the lawyer's clients. No client has made such an assertion. Thus, it is evident Section (b) has no application.

Section (e) makes it illegal to make false or misleading statement in any advertising addressed to the public. Nowhere in the Complaint is it alleged that Marcus & Zelman advertised anything, ever.

Additionally, for the reasons asserted, *supra,* Zanger and Rechanik apply. A claim that a person engaged in criminal deceptive business practices is a crime of fraud. Crimes of fraud are subject to heightened pleading requirements. Fed. R. Civ. P. 9(b). Filing lawsuits, even if frivolous, does not constitute fraud. Rechanik, 2009 WL 721005, *4. Based on the foregoing, Plaintiffs have failed to meet the heightened pleading requirements that Defendants engaged in deceptive business practices which would constitute a predicate act under civil RICO.

C. Plaintiffs Have Not Suffered Any Actionable Harm And Lack Standing To Bring a RICO Claim

Plaintiffs lack standing to bring a RICO claim because they have not suffered any damages. A plaintiff "has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." Sedima, S.P.R.L., 473 U.S. at 496. To have standing under RICO, (1) a plaintiff's "business or property" must have been "injured" (2) "by reason of" the defendant's RICO violation. Walter v. Palisades Collection, LLC, 480 F. Supp. 2d 797, 803–04 (E.D. Pa. 2007) (citing 18 U.S.C. § 1964(c)); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992).

A number of courts have ruled that the expenditure of legal fees are not sufficient injury to convey standing to bring a civil RICO claim. The Ninth Circuit "has not recognized the incurement of legal fees as an injury cognizable under RICO." Thomas v. Baca, 308 Fed. Appx. 87, 88 (9th Cir. 2009); see also Holloway v. Clackamas River Water, 2014 U.S. Dist. LEXIS 170616, *21 (D. Or. Dec. 9, 2014)("legal fees expended to defend against sham lawsuits are not the type of injury to business or property interest which confer standing to bring a civil RICO claim"). Recently, the United States District Court for the District of New Jersey also determined that a plaintiffs incurment of legal fees caused by litigation filed by defendant-attorneys did not constitute an injury which would afford RICO standing.

See Adamo v. Jones, 2016 U.S.Dist. LEXIS 10698, *30 (D.N.J. January 29, 2016)[43]. Furthermore, the harm suffered must stem from the predicate acts underlying the RICO claim. As set forth above, the Plaintiffs have wholly failed to establish they have suffered any harm proximately caused by the predicate acts "committed" by the Defendants in this action and, therefore, lack standing.

POINT V

PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PLAUSIBLE CLAIM WHICH SATISFIES THE HEIGHTENED SCRUTINY REQUIRED UNDER A CLAIM FOR FRAUD

Plaintiffs' skeletal claims of fraud must be dismissed pursuant to Fed. R. Civ. P. 9(b) which imposes a heightened pleading requirement with respect to allegations of fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). As was discussed in regard to Plaintiffs' mail and wire fraud claims the Complaint fails to even hint at a solitary date, time, or place of any alleged fraud. There isn't a scintilla of evidence in the Complaint of the general content of any misrepresentations. Plaintiffs' Complaint contains nothing more than bald assertions which cannot be covered. Based on the foregoing, Plaintiffs' fraud claims must be dismissed.

[43] A copy of the decision in Adamo v. Jones, 2016 U.S.Dist. LEXIS 10698, *30 (D.N.J. January 29, 2016)is attached to the Heines Cert. as Exhibit S.

POINT VI

PLAINTIFFS HAVE FAILED TO STATE A NEGLIGENCE AND LEGAL MALPRACTICE CLAIM UPON WHICH RELIEF MAY BE GRANTED BECAUSE THEY DID NOT HAVE AN ATTORNEY CLIENT RELATIONSHIP WITH MARCUS & ZELMAN

Plaintiffs' unfounded negligence and legal malpractice claims against Marcus & Zelman must be dismissed with prejudice because no attorney-client relationship existed between the parties. Legal malpractice claims are grounded in the substantive law of negligence, and the conduct of attorneys against whom legal malpractice claims are brought is measured by the standard of care applicable to such actions. See Levinson v. D'Alfonso and Stein. P.C., 320 N.J. Super. 312 (App. Div. 1999). A plaintiff cannot alter the applicable standard of care by calling a malpractice claim something other than what it is. See Couri v. Gardner, 173 N.J. 328, 340 (2002). "It is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri, supra, 173 N.J. at 340. Thus, Plaintiffs allegations with respect to Marcus & Zelman must be measured by the standard of legal malpractice regardless of how they are characterized.

The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship that creates a duty of care upon the attorney; (2) the breach of such duty; and (3) proximate causation of damages from the breach. Alevras v. Tacopina, 399 F.Supp.2d 567, 572 (D.N.J. 2005), aff'd, 226 F.App'x 222 (3d

Cir. 2007) (citing Jerista v. Murray. 185 N.J. 175, 185 (2005); McGrogan v. Till, 167 N.J. 414, 425 (2001).

This framework evidences that the existence of an attorney-client relationship is a condition precedent to a finding of legal malpractice. See, e.g., Flaherty-Wiebel v. Morris, Downing & Sherred, 384 Fed. Appx. 173 (3d Cir. 2010); Waterloov Gutter Prot. V. Absolute Gutter Prot., 64 F.Supp. 2d 398, 425 (D.N.J. 1999). An attorney-client relationship can be express or implied. Montgomery Academy v. Kohn, 50 F. Supp. 2d 344, 350 (D.N.J. 1999). Indeed, such relationship "can arise by express contract, court order or implication." Ellis v. Ethicon, Inc., 2005 U.S. Dist. LEXIS 25705, *12 (D.N.J. Oct. 25, 2005). To establish an implied attorney-client relationship "a party must show (1) that it submitted confidential information to a lawyer, and (2) that it did so with the reasonable belief that the lawyer was acting as the party's attorney." Montgomery Acad., 50 F.Supp.2d at 350; Killion v. Coffey, 2014 WL 2931327 (D.N.J. June 30, 2014).

An attorney may owe a duty of care to a non-client if the lawyer knows or should know that the non-client is relying on the attorney's representations and the non-client is not so far removed from the attorney to be entitled to protection. Se Petrillo v. Bachenberg, 139 N.J. 472, 479, 483-84 (1995). The key is whether the attorney invited a non-client's reliance and whether that non-client actually relied on the attorney. See Hewitt v. Allen Canning Co., 321 N.J. Super. 178, 186 (App.

Div.), cert. den., 161 N.J. 335 (1999); Atl. Paradise Assocs v. Perskie, Nehmad & Zeltner, 284 N.J. Super. 678, 685 (App. Div. 1995), cert. den., 143 N.J. 518 (1996). In order to reach a finding of legal malpractice, the attorney would have to undertake an affirmative act or obligation upon which Plaintiffs could have relied. O'Dowd v. Mandelbaum, 2014 N.J.Super. Unpub. LEXIS 2595 (App. Div. October 31, 2014). Claims by non-attorneys against attorneys are only permitted sparingly. Id.

There is zero indication that any of the Defendants in this action ever had any express or implied attorney-client relationship with the Plaintiffs. Marcus & Zelman took no affirmative steps upon which Plaintiffs would have or did rely upon. These are a fatal deficiency to any claim for legal malpractice. To the extreme contrary, Plaintiffs assert they are an engaged in an entity the primary business of which is "debt collection services."[44] Marcus & Zelman are attorneys who represent parties who have been aggrieved by debt collectors, such as Plaintiffs. The actual claim against Marcus & Zelman is that in their capacity as attorneys for aggrieved clients they filed lawsuits against debt collection services. Therefore, Plaintiffs' Complaint acknowledges that not only is there not an attorney-client relationship, but that the relationship, to the extent one exists, is actually very adversarial. Given the adversarial nature of the relationship between the parties, it is an absolute given that Plaintiffs did not submit confidential information to Marcus & Zelman

[44] See Heines Cert., Ex. B, ¶ 1.

with the reasonable belief the law firm was acting on their behalf. Further, it is impossible, under this scenario for Plaintiffs to competently assert that Marcus & Zelman invited them to rely on their legal advice and that Plaintiffs actually relied on that advice. Clearly, there is an absolute inability to allege a colorable claim for legal malpractice as against the Defendants, who have never represented the Plaintiffs; therefore, Plaintiffs' negligence and legal malpractice claims must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court grant their motion to dismiss the Complaint with prejudice for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6).

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